AUGUST AND MARY SOBOTKA

IBLA 83-216 Decided March 22, 1984

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting omitted lands application, M-48743.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Omitted Lands

   Pursuant to the provisions of sec. 211 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1721 (1976), a sale of omitted lands to an individual is only authorized where the lands have been occupied and developed for a 5-year period prior to Jan. 1, 1975, and where the objectives served by conveyance outweigh all public objectives which would be served by retention of the land in Federal ownership.

2. Federal Land Policy and Management Act of 1976: Sales -- Rules of Practice: Appeals: Burden of Proof

   Pursuant to the provision of sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1976), the Secretary is directed to condition any patent issued thereunder with such terms or reservations as are necessary to ensure proper land use and protect the public interest. A party challenging any such condition must show that it does not reasonably ensure proper land use or protect the public interest.

APPEARANCES: August and Mary Sobotka, pro sese.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

August and Mary Sobotka have appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated November 16, 1982, which rejected omitted lands application, M-48743. Appellants, together with Mrs. Joseph Tomalino, had filed this application, which embraced lots 7, 8, 9, and 10 of sec. 20, and lot 6, sec. 21, T. 18 N., R. 57 E., Principal meridian, aggregating approximately 202 acres, under the provisions of section 211(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1721(b) (1976). In its decision, the Montana State Office noted that, under the criteria established for section 211 conveyances, the lands

sought must have been "occupied and developed" for a 5-year period prior to January 1, 1975, and that the conveyance must be in the public interest. See 43 CFR Subpart 2547. The State Office rejected appellants' application on the grounds that it met neither criterion. The decision, however, noted that the State Office was prepared to offer the lands to the applicants pursuant to section 203 of FLPMA, subject to various conditions which are discussed, infra. Appellants timely pursued this appeal.

Before reviewing the arguments presented in this appeal, it should be noted that the land involved was the subject of an earlier appeal by appellants. In Joseph Tomalino, 42 IBLA 117 (1979), this Board affirmed the decision of the Chief, Division of Cadastral Survey, overruling objections to a proposed survey of the subject area and adopting the recommended decision of Administrative Law Judge Harvey C. Sweitzer. In essence, this decision confirmed the finding of BLM that the landform involved derived from an island or islands in existence on November 8, 1889, the date of Montana statehood, rather then having accreted to the uplands, and accordingly was owned by the United States. Subsequent to the Board's decision in Tomalino, on August 15, 1980, appellants filed their application to purchase the lands under section 211 of FLPMA.

Pursuant to established procedures, BLM commenced development of data to determine the permissibility of the application. However, on November 24, 1980, suit was initiated in the United States District Court for the District of Montana, seeking to quiet title to the disputed lands in August Sobotka and Joseph Tomalino. Because of this suit, the Chief, Lands Adjudication, Montana State Office, directed the District Manager, Miles City, to suspend all action on the omitted lands application pending its resolution. Thus, no further action was taken on this application until February 19, 1982, when the quiet title suit was dismissed without prejudice pursuant to the stipulation of the parties. At which time, processing of the omitted lands application was resumed.

In the course of evaluating the proposal, it became obvious that the subject lands had considerable public land resource values. Thus, it was noted that the land was not only heavily used by whitetail deer, pheasant, and waterfowl, but was also suitable as a camping site for numerous recreationists using that stretch of the Yellowstone River. It was pointed out that not only was the number of such available sites rapidly declining but also that, in 1980, the Department of Fish and Game of the State of Montana had noted its objection to any sale of this land.

By letter of July 1, 1982, the Area Manager wrote to appellants' attorney concerning the proposed conveyance. In this letter, the Area Manager outlined various conditions which might be necessary in order to effectuate transfer of the lands. While it was noted that the conditions might be negotiable so long as the public values were protected, the major stumbling block which developed was the requirement that public access to all of the land be assured. By letter of August 18, 1982, BLM was informed by applicants' attorney that this condition was unacceptable.

The Environmental Assessment Report (EAR) for the application was completed on October 21, 1982. This EAR outlined three possible alternatives to

the proposed sale: (1) Rejection in toto; (2) a partial sale; and (3) a sale with reservations. In essence, the District Manager concluded that the omitted lands application could be approved "subject to reservations of patent to protect public values of the affected lands and allow for public access." The State Director's decision of November 16, 1982, while rejecting the application under section 211, did authorize direct sale under section 203 under certain conditions, including inter alia, provision of public access to all of the lands involved.

In their appeal, appellants challenge both the rejection of their omitted lands application under section 211, as well as the conditions precedent to approval of a private sale under section 203. We will address their concerns separately.

[1] As noted above, sales of omitted lands are expressly authorized by section 211 of FLPMA. Section 211(b)(2) provides:

> The Secretary is authorized to convey to the occupant of any omitted lands which, after survey, are found to have been occupied and developed for a five-year period prior to January 1, 1975, if the Secretary determines that such conveyance is in the public interest and will serve objectives which outweigh all public objectives and values which would be served by retaining such lands in Federal ownership. Conveyance under this subparagraph shall be made at not less than the fair market value of the land, as determined by the Secretary, and upon payment in addition of administrative costs, including the cost of making the survey, the cost of appraisal, and the cost of making the conveyance.

43 U.S.C. § 1721(b)(2) (1976).

Thus, as noted by the State Office, in order to avail themselves of the benefit of the statute, appellants were required to show both that the land was occupied and developed for a 5-year period prior to January 1, 1975, and that the conveyance would be in the public interest, i.e., it would serve objectives which outweighed all public objectives which would benefitted by retaining the land in Federal ownership. The State Office stated that neither requirement was met.

Appellants argue that the subject lands have been occupied and used since 1912. They contend that this "use" is comparable to "development" to the extent that any development of the lands is feasible. We do not agree.

The only improvement ever placed on the land was a fence, which served merely to divide the land claimed by the Sobotkas from those claimed by the Tomalinos. While appellants have, indeed, used the land for grazing, such use was under a grazing permit. Such use is, at best, merely sufficient to establish occupancy and does not constitute the "development" required to approve a conveyance of omitted lands. 1/

1/ While appellants accepted the grazing lease "under protest," Judge Sweitzer in his decision had found that they were aware of the Federal claim to the land prior to 1967 and that a 10-year license to graze

Then, too, there is no evidence that approval of an unconditional conveyance of these omitted lands would serve objectives which would outweigh all of the values which retention would serve. On the contrary, appellants have been quite forthcoming in expressing their intention to regulate use of the land by the public. Indeed, the major gain to appellants resides in the fact that they will be able to limit such access by the public. While this may be understandable from appellants' point of view, it is clear that public access will be diminished and, thus, some of the public values lost. While we can appreciate appellants' desire to acquire title to land which they believed they had already purchased, we must agree with the State Office that appellants have failed to establish that the benefits conferred on them will outweigh the loss to the public. Thus, we must agree with the decision of the State Director denying their omitted lands application. 2/

[2] While the decision of the Montana State Office rejected the omitted lands application filed under section 211 of FLPMA, it also offered the land for sale under the provisions of section 203 of FLPMA, 43 U.S.C. § 1713 (1976), subject to various conditions. While appellants seem willing to purchase the land under the provisions of section 203, they strenuously object to the requirement that public access be permitted to all areas of the lands to be sold, desiring to limit uncontrolled public access to the land below the mean high water line. 3/

The applicable regulation, 43 CFR 2711.5-2, directs the authorized officer to condition any patent issued pursuant to section 203 with such terms, covenants, or reservations as "are necessary in the public interest to insure proper land use and protection of the public interest." As the EAR noted, the land at issue is both prime habitat for riparian wildlife and has a high recreation potential in an area in which such opportunities are rapidly diminishing. It seems clear to us that appellants' desire to control and limit public access is incompatible with BLM's desire to maximize recreational opportunities on this parcel.

A party challenging the proposed imposition of conditions and reservations in a patent issued under section 203 has the burden of showing that

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3/ fn. 1 (continued)
the land had issued to appellants' predecessor-in-interest for the land on Dec. 22, 1958. It is open to question, though we do not here decide the matter, whether use pursuant to a Federal permit can be properly used to establish the occupancy necessary to invoke 43 U.S.C. § 1721(b)(2).

2/ We would also point out that section 211(c)(1), 43 U.S.C. § 1721(c)(1) (1976), prohibits any conveyance until the appropriate state and local governments and area-wide planning agencies notify the Secretary that such a conveyance is consistent with applicable state and local land use plans and programs. See 43 CFR 2547.5(a)(2). Considering the expressed opposition of the Department of Fish and Game of the State of Montana, it seems very possible that the State would interpose an objection which would bar conveyance even if appellants were able to meet the statutory preconditions.

3/ Appellants note that they have always been generous in giving their permission to individuals who desired to hunt or camp on their land, but insist that they should have the authority to regulate whoever uses their land.

such conditions do not reasonably serve the public interest. Cf. Blackhawk Coal Co., 68 IBLA 96 (1982). This, appellants have not done.

We recognize that a great amount of the correspondence relating to the proposed conveyance of omitted lands deals with appellants' contention that they do, in fact, own these lands. This contention, however, was fully considered in our decision in Joseph Tomalino, supra, and determined adversely to appellants. It is not now open to a collateral attack in the instant appeal.

We also recognize the considerable efforts expended both by appellants and officers in BLM in attempting to achieve a mutually satisfactory conclusion to this longstanding problem. While we are affirming the State Office's decision herein, nothing in this decision should be construed as precluding future negotiations should the parties so desire. 4/ We hold simply that the State Office properly rejected appellants' omitted land application filed under 43 U.S.C. § 1721(b) (1976), and that appellants have failed to show error in the decision of the State Office to precondition a public sale pursuant to 43 U.S.C. § 1713 (1976) on the maintenance of public access to the parcel to be sold.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Will A. Irwin
Administrative Judge

4/ As an example, appellants and BLM may wish to reexamine one of the alternatives listed in the EAR, i.e., a partial sale. It may be that an agreement could be reached whereby sufficient land is retained in Federal ownership to meet the identified recreation needs such that it would not be necessary to impress any lands transferred to appellants with a requirement that they allow unrestricted public access.